Mellon
Legal Department
One Mellon Center
Pittsburgh, Pennsylvania 15258-0001

January 29, 2004

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave., N.W.
Washington, DC 20551

**RE: Proposed Rules Amending Regulations B, E, M, Z, and DD (Docket Nos. R-1167, R-1168, R-1169, R-1170, and R-1171**

Dear Ms. Johnson:

Mellon Financial Corporation, Pittsburgh, Pennsylvania, appreciates the opportunity to comment on the proposals to add a uniform definition of the term "clear and conspicuous" to the above captioned regulations. We offer the following comments for your consideration.

While the idea of a uniform definition of this term for all consumer disclosures, consistent with the definition in Regulation P, seems superficially appealing, we question whether any useful purpose is served by this initiative. In fact, we believe that such a "one-size-fits-all" approach is fundamentally flawed. And, while the details of the proposed definition are presented in the form of guidance, there is a danger that they will be interpreted as a set of inflexible requirements.

**The proposed elaboration on "clear and conspicuous" is unnecessary.** Each of these regulations calls for a variety of written disclosures in a variety of situations, many of them

dissimilar to the circumstances under which Regulation P disclosures are made. Further, each regulation, while not defining in detail the term "clear and conspicuous," contains some degree of guidance on how disclosures are to be made. In the case of Regulation Z, for instance, this includes voluminous model forms, specific suggested or required terminology, and numerous detailed instructions on the order of disclosures (as in §226.5b(a)(2)), which disclosures must be segregated from other materials and which need not be, and how to make certain terms more conspicuous than other required disclosures. The proposed amendments defining the term "clear and conspicuous," and giving examples of compliance with that standard, simply add another layer of requirements which we believe are superfluous, and to some extent inconsistent with the existing requirements.

In the absence of a finding of widespread confusion on the part of consumers, we see no reason to further elaborate on a term such as "clear and conspicuous." Doing so will, at best, have no significant effect on how disclosures are made by most institutions. At worst, it may become an invitation to litigation, and may cause a massive, industry-wide reexamination and redrafting of forms, at great expense but with little, if any, benefit to consumers.

**The proposals are in some respects inconsistent with the existing regulations.** The primary difficulty relates to disclosures that may be integrated with contractual terms or other materials – for example, the initial open-end credit disclosures under §226.6 of Regulation Z, advertising disclosures under Regulations Z and DD, and application disclosures under Regulation B. Initial open-end credit disclosures may be, and usually are, combined with the terms of the line of credit agreement; this practice avoids the need for redundant documents by allowing the same text to serve both as contractual language and disclosures. Advertising disclosures are typically integrated into the advertisement, sometimes in the form of footnotes; the placement of required disclosures in proximity to "trigger terms" is often necessary for the sake of clarity. Application disclosures (*e.g.*, about income from alimony, or the fact that designating a title such as Mr. or Mrs. is optional) are required to appear in the appropriate locations in the application.

Some of the proposed comments[*] could be construed to require measures that have not previously been considered necessary to segregate or call attention to items that constitute disclosures. The result will be more documents than before, or documents in which certain

[*] In the Regulation Z proposal, see Comments 2(a)(27)-2.i and v, and 2(a)(27)-3.

terms are artificially made to stand out in ways that will not necessarily make the document more easily readable by the consumer.

**The guidance provided by the proposals may be construed as absolute requirements.** Commendably, the Board has attempted to avoid dictating detailed requirements to be applied in the determination of whether the clear and conspicuous standard has been met. Nevertheless, the proposals set forth a wealth of material from which parties in litigation may argue that the standard was violated.

For example, the proposals state that "[d]isclosures in 12-point type generally meet this standard. Disclosures printed in less than 12-point type do not automatically violate the standard; however, disclosures in less than 8-point type would likely be too small to satisfy the standard." This statement will almost certainly be turned into a requirement for a minimum of 12-point type for all disclosures under these regulations, since anything less *might* be construed to violate the standard. This will result in longer, bigger documents, or documents with more pages, becoming the norm – again, not a development that is obviously beneficial to consumers, who are already showered with lengthy disclosure documents in most transactions.

The proposals state that "[e]xamples of disclosures that are reasonably understandable include disclosures that . . . [u]se short explanatory sentences or bullet lists whenever possible." This is undoubtedly intended as a helpful suggestion on how to make disclosure documents more understandable, but the phrase "whenever possible" can easily be misused to justify a witch hunt for paragraphs that could have been presented in bullet list form but weren't.

Similarly, the proposals' reference to "plain-language headings" may have been meant as a common-sense suggestion to be followed when appropriate, but could be taken as a mandate to clutter documents with superfluous, visually "noisy" titles. For example, does a Regulation E disclosure on an ATM receipt really need a plain-language heading?

* * *

In summary, we think this initiative is well-intentioned but ill advised. There is no evident need to further define "clear and conspicuous" in these regulations. While having no clear benefit to consumers, the proposals do have the potential to bring about a great deal of unnecessary work, expense, nitpicking, and litigation. Ironically, the tinkering with

disclosure forms that would likely result from these proposals might well lead to forms that are longer and more confusing.

If you would care to discuss the comments in this letter, please feel free to call the undersigned at 412-234-0564.

Sincerely,

Charles F. Miller
Associate Counsel

cc: Michael E. Bleier, General Counsel